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No.

72-1278

In the

Supreme Court of the United States

OCTOBER TERM, 1972

BOARD OF JUNIOR COLLEGE DISTRICT NO. 515, COUNTIES OF COOK AND WILL AND STATE OF ILLINOIS, a body politic and corporate, and JAMES GRIFFITH, ANTHONY HANNAGAN, DORIS HILL, WILLIAM JACKSON, LESTER KLOSS, SHIRLEY MELECKER AND THOMAS PORTER, individually and as members of the Board of Trustees,

Petitioners,

vs.

RICHARD W. HOSTROP,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

BOARD OF JUNIOR COLLEGE DISTRICT NO. 515, COUNTIES OF COOK AND WILL AND STATE OF ILLINOIS, a body politic and corporate, and JAMES GRIFFITH, ANTHONY HANNAGAN, DORIS HILL, WILLIAM JACKSON, LESTER KLOSS, SHIRLEY MELECKER AND THOMAS PORTER, individually and as members of the Board of Trustees,

Petitioners,

vs.

RICHARD W. HOSTROP,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 21, 1972.

CITATION TO OPINIONS BELOW

The opinion of the District Court, printed in Appendix A hereto, *infra*, p. 1a, is reported in 337 F. Supp. 977 (1972).

The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, p. 8a, is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 21, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
(U.S. Constitution, Amendment XIV, Section 1)

2. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
(U.S. Constitution, Amendment V)

3. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

(U.S. Constitution, Amendment XIV, Section I)

Statutory Provisions

1. Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
(42 U.S.C. § 1983)

QUESTIONS PRESENTED

1. Whether the chief administrative officer of a junior college can be dismissed without affording him the following protection: notice of the charges against him; notice of the evidence upon which the charges will be based; a hearing before a tribunal possessing apparent impartiality; and a chance to present witnesses and confront evidence at the hearing.

2. Whether a public employee's procedural due process and first amendment rights can be determined by a court when the record before that court does not disclose the working relationship between the employee and his employer.

3. Whether the procedural due process safeguards which must be granted to a chief administrative officer of a public school must be identical in form to those extended to teachers.

4. Whether a board of education can serve as the forum for a pre-discharge hearing when that board discharges its chief administrator.

STATEMENT

The former chief administrator of a junior college filed a federal civil rights action against his former employing board as well as against the individual members of the board. His complaint alleged that his First, Fourth, Fifth, and Fourteenth Amendment rights were violated when he was discharged without a hearing before an impartial tribunal following the public disclosure of a memorandum which he had prepared and distributed to the administrative staff. The memorandum criticized the existing Ethnic Studies Program and proposed drastic changes in it.

In the District Court, defendants moved for summary judgment on the ground that no genuine issue of material fact was raised by plaintiff's amended complaint and his disposition. Although the Court's docket sheet indicates that the deposition was filed eight months previous to the District Court's decision, the District Court mistakenly concluded that no deposition had been filed. Accordingly, the District Court considered the motion as a motion to dismiss for failure to state a claim upon which relief can be granted, and dismissed the case.

The District Court based its dismissal of plaintiff's First Amendment claim on language found in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). While holding that a classroom teacher could not be fired for speaking out on issues of public importance, the *Pickering* court had remarked that the presence of other factors might have dictated a different result:

> The statements [made by plaintiff] are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among

> coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.
>
> • • •
>
> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.
>
> (391 U.S. 563, 569-570 (1968)

After its analysis of the facts in the present case, the District Court concluded that the factors referred to in *Pickering* were present and the "different conclusion" was applicable. Specifically, the District Court determined that Dr. Hostrop's position was one involving a close and intimate working relationship with his employer and, because of this relationship, his employer could limit his right to disagree with the board.

Finally, in rejecting plaintiff's claim that his dismissal required a trial-type hearing, the Court again relied upon *Pickering*:

> Just as the Supreme Court has recognized that the First Amendment may have restricted application
>
> where "close working relationships are involved" (*Pickering*, 391 U.S., at 569-70), so also this court believes that the due process clause of the Fourteenth

Amendment must be limited in application to those types of relationships in public employment.

On appeal, both parties again referred to and quoted from the plaintiff's deposition. In particular, the defendants argued that the deposition proved that plaintiff was discharged at a meeting specially convened for the purpose of considering plaintiff's employment status, and that both plaintiff and his attorney were informed of the time, place, and nature of the meeting, but he and his attorney refused to attend the meeting. Although the deposition was a part of the record on appeal, and, therefore, under Sections 10(d) and 30(a) of the Appellate Court's own rules, could be relied upon by the parties and considered by the Appellate Court, the Appellate Court expressly refused to consider the deposition. The Appellate Court rejected the District Court's analysis of *Pickering*, and decided that plaintiff's amended complaint contained allegations which, if true, constituted violations of plaintiff's First Amendment rights to free speech and his procedural and substantive rights under the Fourteenth Amendment. The Court also stated that: "[t]he record does not identify the nature of the competing interests or the extent to which they are irreconcilable. . . ." Having concluded that the record did not identify the nature of the competing interests, the Court, nevertheless, proceeded to balance these interests to ascertain the nature of the predischarge hearing required by the Fourteenth Amendment. It then concluded that the plaintiff was entitled to "a notice of the charges against him, notice of the evidence upon which the charges will be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing."

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decisions of the United States Supreme Court in *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961), *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), *Board of Education* v. *Roth,* 408 U.S. 564 (1972), and *Perry* v. *Sindermann,* 408 U.S. 593 (1972). In *Pickering,* this court made it clear, beyond doubt, that the First Amendment rights of public employees must be determined in light of the employment relationship of the parties (391 U.S. 563, 569-570); plaintiff's employment relationship was ignored here. In *Cafeteria Workers* and, again, in *Roth,* this court stated that the due process procedures required by the Fourteenth Amendment can only be determined through a balancing process. (367 U.S. 886, 895 (1961)). At page 895 of the *Cafeteria Workers* case, the Supreme Court stated:

> The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of interest . . . "Due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reasons, the past course of decisions. *Joint Fascist Comm.* v. *McGrath,* 341 U.S. 123, 162-163 (concurring opinion)

The Supreme Court also defined the considerations involved in determining the procedures required in a given case:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. (367 U.S. 886, 895 (1961))

In *Roth*, the Supreme Court again referred to the need for a balancing of interests: ". . . a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process." (408 U.S. 564, 570 (1972)).

Given the Appellate Court's conclusion that the record did not identify the nature of the competing interests, it is apparent that it did not undertake any true balancing. Rather, after refusing to analyze the type of hearing offered to plaintiff, as evidenced by his own deposition, the Court mandated a full trial-type hearing before an "apparent impartial tribunal." It is submitted to this Court that if the *pro forma* type of balancing evident in this case is permitted, the guidelines established in *Cafeteria Workers, Pickering, Roth,* and *Sindermann* will become meaningless. Instead, federal courts will eschew any meaningful balancing and merely mandate full trial-type hearings.

2. Clearly, the questions presented here are of great importance affecting virtually every public school in the United States. The majority of the public schools in this nation, whether they be elementary schools, high schools, or junior colleges, are governed by locally elected boards of trustees. These boards are charged by their respective state statutes with developing and implementing the policies necessary for the operation of their schools. To implement their policies, these boards have traditionally employed administrators. The most important administrator in any school district is the chief administrator, for this individual serves as the alter ego of the board in his relations with the teachers, the students, and the community. Unlike a teacher, his position requires that he cannot be an adversary of the board, but he must serve as its

advocate. When policy disagreements arise between him and the board, he cannot call an "impasse"; instead, he must carry out the board's policies. Truly, his position vis-à-vis the board is a close and intimate working relationship requiring a high degree of personal loyalty and confidence.

To require school boards to provide full trial-type hearings before apparent impartial tribunals prior to discharging their chief administrators would create havoc and uncertainty in the nation's public schools. Such a requirement is inherently inconsistent with the employee-employer relationship involved. Moreover, to state, as the lower court did, that the unnamed and unidentified tribunal could determine that the chief administrator should be reinstated ". . . when [his discharge] is not justified by the facts" is unthinkable. Faced with such a possibility, school districts would become extremely reluctant to dismiss even the most incompetent chief administrators.

Furthermore, those cases which have required a prior hearing accompanied by reasons for the State's actions are in no way analogous to the present case. In *Connell* v. *Higgenbotham,* 403 U.S. 207 (1971), the court held that a public employee may not be summarily dismissed for refusing to swear that he does not believe in the overthrow of the government by force. In *Goldberg* v. *Kelly,* 397 U.S. 254, 264-265 (1970), the court held that the welfare benefits may not be terminated without notice and a prior hearing. In *Bell* v. *Benson,* 402 U.S. 535, 539 (1971), the court held that a state license may not be summarily revoked where the effect of license revocation might preclude a person from pursuing his livelihood. In *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), the court held that a person may not be subjected to public disgrace by the government without a prior hearing.

Unlike any of the aforementioned cases, the present case does not present any prospect for a remedy through a hearing. In *Connell, Goldberg, Bell,* and *Constantineau,* the right to a hearing afforded by the Supreme Court at least, presented the prospect that a hearing could afford the affected person some relief. For instance, it is possible that in *Connell* a hearing could show that the prospective employee did not believe in the overthrow of the government. In *Goldberg,* it is possible that a hearing could show that the plaintiff was entitled welfare benefits. In *Bell* it is possible that a hearing could show that the plaintiff was entitled to be licensed by the state. In *Constantineau,* it is possible to show that the plaintiff was not frequently intoxicated. In the present case, there is no possibility that the plaintiff could be reinstated. The plaintiff has made it very clear that he had no intention of obeying the orders and directives of the Board of Trustees. Furthermore, the fact that the Board has lost confidence in the President completely precludes any further working relationships between the plaintiff and the Board of Trustees. If the Board is to fulfill its statutory obligations to manage and govern the college, it must retain the right to summarily dismiss its President when it no longer has confidence in him. To accept any other conclusion would force the Board to accept a President with whom it can no longer work in carrying out its duties.

3. While the decisions of this Court in *Roth* and *Sindermann* have done much to clarify questions concerning due process rights in cases of teacher dismissals, it is urged that further clarification is needed as to the due process and First Amendment rights of those public employees who serve in administrative or managerial capacities. The problem and issues involved in this case,

of course, are not limited to public schools; rather, these issues can arise whenever any public body attempts to dismiss an administrator. Since there are millions of employees who fall into this category, the issues raised by this case will undoubtedly arise again and again. Until these issues are resolved by this Court, the only federal precedent dealing with the procedural and substantive due process rights of chief administrators will be the Appellate Court's decision in the instant case, and that Court's opinion has merely equated the rights of chief administrators with the rights of classroom teachers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY SCARIANO
BRUCE C. MACKEY
Counsel for Petitioners

March 16, 1973

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD W. HOSTROP,
Plaintiff,
vs.
BOARD OF JUNIOR COLLEGE DISTRICT No. 515, COUNTIES OF COOK AND WILL AND STATE OF ILLINOIS, a body politic and corporate, and JAMES GRIFFITH, ANTHONY HANNAGAN, DORIS HILL, WILLIAM JACKSON, LESTER KLOSS, SHIRLEY MELLECKER and THOMAS PORTER, individually and as members of the Board of Trustees,
Defendants.

No. 71 C 147

MEMORANDUM OPINION

This is a suit brought pursuant to the first, fourth, fifth, and fourteenth amendments to the United States Constitution and 42 U.S.C. 1981 et. seq. Plaintiff is a former chief administrative officer of Prairie State College and defendants are members of the board of the college district, who terminated plaintiff's employment. They are sued individually and as a corporate body.

Before the court is defendants' motion for summary judgment, which the court believes should be considered more properly as a motion to dismiss for failure to state a claim upon which relief can be granted. Filed with the court are plaintiff's amended complaint (a prior motion

to dismiss having been granted), defendants' motion, two affidavits on behalf of the defendants, and memoranda submitted by both sides. In their memoranda both sides refer to depositions, but none have been submitted to this court.

In his complaint plaintiff alleges that he was fired because of an administrative staff memorandum in which he made recommendations for changes in the Ethnic Studies Program. The memorandum was intended to be confidential, but it is alleged that it was made public by someone other than plaintiff. He contends that his first amendment rights were violated since he was fired solely because of his memorandum and that his fifth and fourteenth amendment rights were violated because he was not given a hearing. This court finds that as a matter of law plaintiff has raised no constitutional claims and therefore the complaint is dismissed for failure to state a claim.

The most recent Supreme Court case concerning the first amendment rights of public school employees is *Pickering* v. *Board of Education,* 391 U.S. 563 (1968). In that case plaintiff, a high school teacher, sued the board after he was fired for sending to a local newspaper a letter that was critical of the way in which the school board and the superintendent handled proposals to raise revenue. The Court held that unless he knowingly or recklessly made false statements, a teacher could not be dismissed from public employment as a result of his speaking on issues of public importance. The Court noted, however, that factors not present in that case could result in a different finding:

> The statements [made by plaintiff] are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among co-workers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superin-

> tendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.

Id. at 569-70

> • • •
>
> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.

Id. at 570 n.3.

While none of the parties nor this court have found a case as the instant one involving a school administrator rather than a teacher, if the above-quoted exception drawn by the Supreme Court is to have any application, this court believes it must be in a case such as the one now before it.

According to the employment contract between plaintiff and defendant board, plaintiff agreed to "abide by all rules, regulations and directions issued by the Board in carrying out the duties of his position . . ." as chief administrative officer of the college. The nature of the position of a college president is such that the board must have the "confidence" in and the "personal loyalty" of the president. In order for the working relationship between them to be effective the right of a president to make public statements or to disagree with the board may have to be limited. Therefore, assuming that the memorandum which became public was the basis for plaintiff

being fired[1] this court finds that this is the type of case envisioned by the Court when it drew the exception in *Pickering* and that the plaintiff thus has no first amendment rights that were violated.

This court further finds that plaintiff has raised no due process rights that would entitle him to notice of charges and a hearing at which he could rebut them. The Supreme Court has held that interests must be considered to decide what due process rights an individual has:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Cafeteria & Restaurant Workers v. *McElroy*, 367 U.S. 886, 895 (1961). In that case the Court held that a cook at a cafeteria operated by a private concessionaire in a military gun factory could be excluded from the factory for reasons of security without being given a hearing. The Court noted that it "has consistently recognized that an interest closely analagous to [petitioner's], the interest of a government employee in retaining his job, can be summarily denied." *Id.* at 896.

Thus, in light of *Cafeteria Workers* this court must undertake a balancing of interests to decide what, if any, procedural due process rights may be guaranteed to plaintiff by the United States Constitution. Since, as mentioned

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[1] It is not necessary to decide whether the memorandum in question was distributed privately or publicly and if publicly, whether it was done by plaintiff or someone else. If it was public it falls within the exception established in *Pickering*, and if private, the first amendment is not drawn into question, and moreover, the state can limit private debate where it is detrimental to the functioning of a public body. See *e.g.*, *Lefcourt* v. *Legal Aid Society*, 312 F. Supp. 1105, 1113 (S.D.N.Y. 1970).

above, no case involving a school administrator has been found by the parties, they have cited to this court cases involving non-tenured teachers.

Both parties have argued that the recent case of *Roth* v. *Board of Regents,* 446 F. 2d 806 (7th Cir. 1971), *affirming* 310 F. Supp. 972 (W.D. Wis. 1970), *cert. granted,* 40 U.S.L.W. 3194 (U.S. Oct. 26, 1971) (No 71-162) supports their positions. In *Roth* plaintiff was a non-tenured assistant professor at a state universary. After being informed that his one year contract would not be renewed, he sued, alleging that he was not offered another contract because of his expressions of opinion allegedly protected by the first and fourteenth amendments. In deciding whether plaintiff had any due process rights the trial court undertook the balancing test enunciated in *Cafeteria Workers.* While noting that a university should have "considerable latitude" in deciding whether a probationary teacher should remain and that it should have "available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer . . . ," the court found in favor of the plaintiff. The court stated that the university had no interest in a regime which made a decision wholly without support in fact. The interest of the plaintiff in jeopardy was his academic career. The court found that the balancing test compelled the conclusion that under the due process clause the decision not to retain a state university non-tenured professor may not rest on a basis wholly unsupported in fact or on a basis wholly without reason. 310 F. Supp. at 978-79. The university was ordered to give reasons why plaintiff was not retained and to give plaintiff a hearing at which he could respond to those reasons.

The Court of Appeals affirmed, 446 F. 2d 806, 809 (7th Cir. 1971) holding that

> the district court properly considered the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor and concluded, after balancing it against the governmental

> interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection.

The court acknowledged that other circuits have declined to recognize such rights,[2] but went on to point out that the Supreme Court has emphasized the importance of vigilant protection of constitutional freedoms in the academic community, citing *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960).

This court does not think that there need be the same "vigilant protection" when an administrator is involved as may be necessary when a teacher is. The need for teachers to have freedom in what they teach arises from the very heart of the first amendment. The workshop of the administrator, however, is not the classroom but the office and the conference room. His primary duties are to coordinate, delegate, and regulate, not to educate. The fact that he is the "executive officer *of the board* . . ." Ill. Rev. Stat. ch. 122, §103-26 (Supp. 1972) (emphasis added) illustrates the need for, and in fact the intention of the legislature for, a close working relationship between him and the board. The public retains control of the school system by electing the board, Ill. Rev. Stat. ch. 122, §103-7 (Supp. 1972), which in turn must manage and govern the college. Ill. Rev. Stat. ch. 122, §103-25 (Supp. 1972). It does this through the chief administrative officer.

Thus, the considerations before this court are not the same as those before the courts in *Roth*. It is true that, as

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[2] 446 F. 2d at 809. The circuits are divided on the question. In *Orr* v. *Trinter*, 444 F. 2d 128 (6th Cir. 1971), the court used the balancing test and concluded that a non-tenured teacher had no due process rights because of the board's interest in free and independent action with respect to his employment. The Fifth Circuit, however, found that a non-tenured teacher must be given a hearing if he requests it. *Sindermann* v. *Perry*, 430 F. 2d 939 (5th Cir. 1970), *cert. granted*, 403 U.S. 917 (1971) (No. 952).

with *Roth*, the plaintiff's career may be harmed by his dismissal. The court acknowledges that if the dismissal was for reasons that had no factual basis, the college community as a whole is harmed by a reduction in respect for the board and other administrators and perhaps by a loss of good teachers as a result. Against these considerations, however, is the fact that the policies of the board, a publicly elected body, are carried out through the chief administrative officer. The board must therefore have wide discretion in deciding whether to hire or fire a person who will be or has been in essence its agent. The discretion, naturally, is not unlimited, but Illinois law prohibits the most obvious forms of constitutionally prohibited discrimination: that based on sex, race, color, creed or national origin. Ill. Rev. Stat. ch. 122, §103-26 (Supp. 1972).

Just as the Supreme Court has recognized that the first amendment may have restricted application where "close working relationships" are involved (*Pickering*, 391 U.S. at 569-70), so also this court believes that the due process clause of the fourteenth amendment must be limited in application to those types of relationships in public employment.

This court finds that this plaintiff has no first amendment or due process rights which have been violated in regard to his public employment. The complaint is dismissed for failure to state a claim upon which relief can be granted.

R. B. Austin
Judge, United States District Court

Dated: February 1, 1972

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972—SEPTEMBER SESSION, 1972

No. 72-1285

RICHARD W. HOSTROP,
Plaintiff-Appellant,

v.

BOARD OF JUNIOR COLLEGE DISTRICT No. 515, COUNTIES OF COOK AND WILL, AND STATE OF ILLINOIS, a body politic and corporate, and JAMES GRIFFITH, ANTHONY HANNAGAN, DORIS HILL, WILLIAM JACKSON, LESTER KLOSS, SHIRLEY MELLECKER, and THOMAS PORTER, Individually and as members of the Board of Trustees,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 C 147

RICHARD B. AUSTIN, *Judge.*

ARGUED NOVEMBER 1, 1972 — DECIDED DECEMBER 21, 1972

Before SWYGERT, *Chief Judge,* CASTLE, *Senior Circuit Judge,* and PELL, *Circuit Judge.*

CASTLE, *Senior Circuit Judge.* Appellant Richard W. Hostrop appeals the action of the district court dismissing his civil rights complaint against the Board of Junior College District No. 515 and its members for failure to state a claim upon which relief can be granted. The basic question on this appeal is whether the rights of free expression and procedural due process traditionally given

to teachers and other public employees extend also to a college president who was hired to act as the direct agent of a school board.

Plaintiff Hostrop's complaint alleged the following facts, which we shall take as true for the purposes of this appeal. Hostrop was appointed President and chief administrative officer of Prairie State Junior College in Chicago Heights, Illinois by the defendants through a series of contracts which extended his tenure until June 30, 1972.[1] On May 25, 1970, as part of his official duties, plaintiff prepared a confidential memorandum for circulation among his administrative staff which requested that the staff consider certain proposed changes in the college's ethnic studies program for discussion at the next staff meeting. After an unknown person made a copy of this memorandum public, certain defendants questioned Hostrop's right to make such a proposal and told him that it was a breach of his administrative duties and was not a matter of free expression. On July 13, 1970, plaintiff was summoned to the office of counsel which the Board had recently hired and told that he had the choice of resigning or taking the consequences of being fired. The publication of the memorandum was mentioned as being a prime reason for Hostrop's termination, although he was told that he would be fired without any notification of the charges against him. Ten days later the Board met and terminated Hostrop's contract without giving him any hearing or opportunity to speak in his defense. A list of charges that supposedly justified his termination was given to Hostrop some time later.[2]

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[1] Defendants challenged the validity of the contracts executed by the Board and Hostrop in their memorandum filed with the district court, but this issue was not resolved.

[2] This belated submission of the reasons for dismissal listed such things as the failure of Hostrop to devote full time to his duties, his withholding of information from the Board, his failure to give attention to certain college

Plaintiff's complaint concluded that the alleged facts showed a deprivation of his right to free speech and a denial of due process of law, and asked that the court order the college to give him a full and complete hearing, enjoin the defendants from replacing him with another person as president, and declare that his dismissal violated his first amendment rights. A second count of the complaint alleged the same facts as the first count plus the facts that the defendants had violated the Illinois anti-secrecy statute and that the plaintiff had suffered both mental strain and financial loss because of the defendants' conduct. This count asked for recovery of actual damages of $100,000 and punitive damages of $500,000.

The district court dismissed the complaint for failure to state a claim upon which relief can be granted,[3] *Hostrop* v. *Board of Junior College District No. 515*, 337 F. Supp. 977 (N.D. Ill. 1972), finding that Hostrop's position as a college president directly responsible to the Board required that he be loyal to the Board and maintain its confidence in him as conditions of his continued employment. Reasoning from a remark in *Pickering* v. *Board of*

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[2] (Continued)
problems, and his attempt to mislead the Board during the negotiations for the extension of his contract. Preparation of the ethnic studies memorandum was not specifically mentioned as a reason for dismissal, although one charge stated that "Hostrop failed adequately and competently to deal with the administration of the Black Studies Program, causing both the students at the college and the Board grave concern."

[3] The record shows that defendants moved for summary judgment on May 7, 1971. The deposition of Dr. Hostrop was filed with the clerk of the district court on June 1, 1971, and supporting affidavits and exhibits were filed in July and October. The district court treated the defendants' motion as a motion to dismiss in its opinion dated February 1, 1972, stating that no deposition had been filed. We have not considered the contents of the deposition for the purpose of disposing of this appeal, since it was never considered by the district court.

Education, 391 U.S. 563 (1968), that first amendment rights of persons in personal and intimate working relationships with their superiors may be restricted, the court found that Dr. Hostrop's position *vis-à-vis* the Board required that his right to make public statements or to disagree with the Board be limited. 337 F. Supp. at 978-79. Applying the test of *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961), to balance the interests of the Board against those of Dr. Hostrop, the court found that the need of the Board to have wide discretion in deciding to fire its presidents without asserting reasons outweighed any need of the plaintiff to know the reasons for his dismissal and any harm to his professional career. 337 F. Supp. at 980.

Initially, we note that the disposition of a motion to dismiss for failure to state a claim in a case such as this one is an extremely difficult task. As the district court recognized, resolution of the issues requires an analysis of the working relationship between Dr. Hostrop and the Board and a balancing of the various competing interests of each. Unfortunately, the record at this stage of the litigation does not clearly define the working relationship between the parties. It does not indicate how closely Hostrop had to follow the dictates of the Board—how often he met with the Board, how much power he had to formulate educational policy with the Board's blanket approval, or whether he had any ability to debate Board members on certain issues that would be decided by a vote of the Board. A consideration of these factors would indicate more clearly whether Hostrop's right to make his recommendations or to disagree with the Board had to be limited, as the district court asserted, "[i]n order for the working relationship between them to be effective." Similarly, the record does not identify the nature of the competing interests or the extent to which they are irreconcilable—how a hearing procedure would interfere with the discretion of the Board in hiring and firing personnel, whether other administrators were granted hearings before action was taken against them, and

what the effects of the hearings given others actually were. With these shortcomings in the record in mind, we turn to the allegations of the complaint.

1. Preparation of the Memorandum As a Ground for Discharge

Plaintiff argues on this appeal that the protections that have traditionally been given to the speech and associations of academicians[4] should extend also to his circulation of the ethnic studies memorandum. It is true that the judiciary has steadfastly construed the concept of freedom of expression broadly as a means of prompting vigorous, robust debate,[5] and that it has consistently rejected attempts to formulate absolute rules which would restrict the first amendment rights of whole classes of individuals, whether they be students,[6] campus speakers,[7] school newspaper editors,[8] student organizers,[9] or teachers.[10] Against this commitment to academic freedom, defendants are asking this court to excise a class of academic personnel who will have no first amendment rights.

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[4] *Healy* v. *James*, 408 U.S. 169, 180-81 (1972), *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), *Wieman* v. *Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, Jr. concurring).

[5] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), *Donahue* v. *Staunton*, ... F.2d ..... (7th Cir.) (Slip Opinion No. 71-1160, July 6, 1972 at 10), *Kiiskila* v. *Nichols*, 433 F.2d 745, 748 (7th Cir. 1970).

[6] *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513 (1969), *Breen* v. *Kahl*, 419 F.2d 1034, 1036-37 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

[7] *Brooks* v. *Auburn University*, 412 F.2d 1171, 1172 (5th Cir. 1969).

[8] *Scoville* v. *Board of Education*, 425 F.2d 10, 13 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970).

[9] *Healy* v. *James*, 408 U.S. 169, 186 (1972).

[10] *Pickering* v. *Board of Education*, 391 U.S. 563, 574 (1968), *McLaughlin* v. *Tilendis*, 398 F.2d 287, 288-89 (7th Cir. 1968).

Defendants argue that college administrators like Dr. Hostrop can be discharged whenever they circulate proposals that might offend the sensibilities of the Boards that hired them, for their jobs require that they do not offend the Boards. Defendans rely upon language from *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), to differentiate between teachers and administrators, one class which may dissipate the confidence of the school board by making certain statements, and one class which cannot afford to:

> The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. . . . Appellant's employment relationships with the Board, and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.
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> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

Id. at 569-70, 570 n.3. Defendants submit that personal loyalty and confidence are necessary for the proper functioning of the working relationship between Dr. Hostrop and themselves, and that since the circulation of the ethnic

studies memorandum could have arguably affected this loyalty and confidence, Hostrop can be discharged.

We do not interpret the above-quoted remarks from *Pickering* so as to support defendants' position on this appeal, especially when that case is placed within the context of other first amendment decisions. It has been consistently held that a government cannot punish a person for his speech alone, but only for speech that causes substantial disruption or that hinders the functioning of the state.[11] In this perspective, *Pickering* should not be read to authorize the discharge of a college president merely because he expresses an opinion that could be interpreted as a sign of disloyalty or an undermining of the confidence placed in him. Instead, *Pickering* holds that an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements. *Donahue* v. *Staunton*, ... F.2d ....., (7th Cir.) (Slip Opinion No. 71-1160, July 6, 1972 at 14) (Swygert, C.J. dissenting). We find that Dr. Hostrop's suggestions about the ethnic studies program which appear in the complaint cannot, on their face and by themselves, be taken as a serious impairment of the effectiveness of the working relationship between him and the Board that the defendants could discharge him merely for making the suggestions.[12] Absent

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[11] *Grayned* v. *City of Rockford*, 408 U.S. 104, 118 (1972), *Cohen* v. *California*, 403 U.S. 15, 23 (1971), *Tinker* v. *Des Moines School District*, 393 U.S. 503, 513-14 (1969), *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

[12] An important distinction between *Pickering* and the instant case is that teacher Pickering engaged in criticism of the school board and that Dr. Hostrop merely made a suggestion for a change in curriculum. It is unclear from *Pickering* whether the Supreme Court thought that criticism of a superior by an employee in a close working relationship with him would be analogous to the speaking of "fighting words" so that the state could discharge the employee merely because he spoke the words of criticism,

actual proof of such an impairment, the face of the pleadings shows no reasons to deny Dr. Hostrop's first amendment rights. It was therefore error to dismiss his complaint for failure to state a cause of action on first amendment grounds.[13]

In fact, the general guidelines drawn by *Pickering* for deciding whether an employee's speech should be restricted support Dr. Hostrop's first amendment right to propose changes in the curriculum of Prairie State Junior College. *Pickering* recognizes that the position of the person

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[13] (Continued)
or whether the state would have to prove that the working relationship between the two had deteriorated because of the criticism so that the two could no longer work effectively together.

In both *Lefecourt* v. *Legal Aid Society*, 312 F. Supp. 1105 (S.D.N.Y. 1970), *aff'd*, 445 F.2d 1150 (2d Cir. 1971), and *Watts* v. *Seward School Board*, 454 P.2d 732 (Alas. 1969), *cert. denied*, 397 U.S. 921 (1970), employees were discharged for a series of confrontations and incidents which cumulatively destroyed the efficiency of the governmental units for which the employees worked. Furthermore, in both cases the action of the government employer in discharging the employees was upheld only after a trial court heard evidence relating to the kind of criticism involved and its actual effects.

[13] The district court did not decide whether the memorandum was distributed publicly or privately, but thought this issue was important because of its view that the first amendment does not protect private communications. This point was not argued on appeal. Past decisions have extended the first amendment to protect private statements made by public employees, *Muller* v. *Conlisk*, 429 F.2d 901 (7th Cir. 1970), *Swaaley* v. *United States*, 376 F.2d 857, 863 (Ct. Cl. 1967), and statements made by public employees in carrying out their assigned duties. *Downs* v. *Conway School District*, 328 F. Supp. 338 (E.D. Ark. 1971), *Mailloux* v. *Kiley*, 323 F. Supp. 1387, 1392 (D.Mass.), *aff'd*, 448 F. 2d 1242 (1st Cir. 1971).

seeking to express his views and the nature of the controversy to which he is directing his comments are important factors to consider in determining whether his freedom of expression should be protected. 391 U.S. at 571-72. The Court recognized that teachers, because of their position in the educational system, are able to make significant contributions to the public debate concerning the allocation of educational funds that precedes public votes. Here Dr. Hostrop, because of his background and leadership position as college president, sought to contribute to the discussion of a curriculum issue that would be decided by vote of the Board. To silence "vigorous and robust debate" in the formulation of educational policy on the administrative level would certainly be contrary to the spirit of the Pickering decision.[14]

Plaintiff's allegation that he was discharged merely for circulating the memorandum entitles him to relief under another legal theory distinct from his assertion of his right to freedom of expression. Plaintiff alleged that he circulated the memorandum as part of his official duties, and that it was only several days after it had become public that the members of the Board told him that he had no right to express his views in such a way and that he would be terminated because of this expression. These facts clearly show arbitrary action on the part of the defendants which the due process clause was meant to prevent. Plaintiff, as a public employee, is entitled to be protected from retaliation for actions which he had every reason to believe were a part of his assigned duties. The facts alleged in his complaint indicate that he has a cause of action resulting from the deprivation of substantive due process. *Conway* v. *DuPont School District*, 333 F. Supp. 1217, 1220 (D.Del. 1971). *cf. Downs* v. *Con-*

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[14] We recognize that defendants may demonstrate at trial that Dr. Hostrop's circulation of the memorandum was evidence of insubordination and actually produced the harmful effects which the Pickering decision indicated may be grounds for discharge.
Such evidence could justify the discharge.

way School District, 328 F. Supp. 338, 348-49 (E.D. Ark. 1971), *Mailloux* v. *Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

II. Denial of a Pre-Discharge Hearing

The threshold inquiry in determining whether a complaint states a cause of action based on the denial of procedural due process is whether the plaintiff has shown that the state has infringed upon a personal interest protected by the fourteenth amendment—either life, liberty, or property. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), *Lipp* v. *Board of Education*, ... F.2d ....., (7th Cir.) (Slip Opinion No. 71-1912, November 27, 1972 at 4 n.3). If the complaint does assert the deprivation of a protected interest, due process of law requires that certain procedural safeguards be extended before the state can extinguish that interest. Defendants argue that plaintiff has asserted no interests worthy of due process protection. They also argue that they should have unfettered discretion to hire and fire presidents as a means of expediently carrying out their statutory duties, and that this necessity outweighs any interest of the plaintiff in receiving any kind of hearing before his termination.

We find that plaintiff's complaint alleges at least two protected interests which the defendants have infringed upon, and that plaintiff was entitled to some form of hearing before his discharge. Plaintiff's complaint makes a credible showing of a deprivation of "liberty" as it is defined in *Board of Regents* v. *Roth*, 408 U.S. at 573. A person is deprived of "liberty" if the state damages his standing in the community by charging him with an unsavory character trait such as dishonesty or immorality. Plaintiff's complaint alleges facts showing an attack by defendants on his veracity, for the list of charges which the defendants submitted to justify his dismissal accused him of misrepresentations, supplying false information, and withholding important information. In such a case, due process must provide notice and an opportunity to refute such charges. *Id.* Plaintiff's complaint also

alleges facts showing a deprivation of "property" as it is defined in *Roth, Id.* at 576-78. A person is deprived of property if the government extinguishes his legitimate claim of entitlement to his job. The complaint alleges that Dr. Hostrop had a legitimate claim of entitlement to the position of President of Prairie State Junior College at the time he was discharged on July 23, 1970, for defendants had agreed to employ him until June 30, 1972 under the terms of a series of employment contracts. A term of employment set by contract has been recognized as a property interest which the state cannot extinguish without conforming to the dictates of procedural due process. *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972), *Board of Regents* v. *Roth*, 408 U.S. at 576-77. The existence of such a contractually-established property interest obligates the Board to grant plaintiff a hearing where he can be fully informed of the reasons for his nonretention and challenge their sufficiency.[15]

Having found that plaintiff has asserted protected interests that are entitled to due process procedural safeguards, we must balance the interests of the state against those of the individual to determine the form of hearing that Dr. Hostrop is entitled to before his termination.

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[15] The fact that plaintiff relies upon his employment contract to establish a property interest worthy of protection through the due process clause does not mean that his only remedy is a contract action in state court. A civil rights actions based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The civil rights action based on deprivation of a property interest established by contract seeks vindication for the arbitrary manner in which the contract was breached. A "garden variety" contract action seeks damages only for the losses caused by the breach once it has occurred in any manner whatsoever. There will be occasions when one action will lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process rights to notice and a hearing.

Board of Regents v. *Roth*, 408 U.S. at 570. The Board's interest consists of maintaining efficiency through the prompt removal of its chief administrator when it reasonably believes that it can no longer work effectively with and through that person. But it is questionable whether efficiency is a compelling interest,[16] so that this consideration should work to deny a hearing for one college president when courts have rejected it as a rationale for denying hearings to thousands of other employees. *See, Perry* v. *Sindermann*, 408 U.S. 593 (1972), *Kennedy* v. *Sanchez*, ... F. Supp ..... (N.D. Ill.) (Opinion No. 72 C 771, October 24, 1972). Dr. Hostrop's interests lie in protecting his first amendment rights and future employment prospects and in avoiding dismissal when it is not justified by the facts. We find that the resolution of these interests requires that plaintiff be given a notice of the charges against him, notice of the evidence upon which the charges will be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing. *Board of Regents* v. *Roth*, 408 U.S. at 570 n.7, *Ferguson* v. *Thomas*, 430 F.2d 852, 856 (5th Cir. 1970), *Kennedy* v. *Sanchez*, ... F. Supp. ..... (N.D. Ill.) (Opinion No. 72 C 711, October 24, 1972 at 6). *See also, Lucas* v. *Wisconsin Electric Power Company*, 466 F.2d 638, 652 n.30 (7th Cir. 1972). We recognize that there are differences between college administrators and teachers so that the Board may have different justifiable grounds for dismissing its president. A court that may be called upon to review the findings of an administrative hearing which results in the discharge of a college president will have to take the

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[16] "The price which a government must pay to protect the constitutional liberties of its employees is some loss of the efficiency enjoyed by private employers; the Supreme Court has repeatedly decided that the value of those individual liberties is well worth the cost." *Illinois State Employees Union, Council 34* v. *Lewis*, ... F.2d ..... (7th Cir.) (Slip Opinion No. 71-1619, September 18, 1972 at 19).

particular duties of the president and his working relationship with the school board into account.

We find that the plaintiff has stated valid causes of action showing that he was deprived of his first amendment right to free expression and his fourteenth amendment right to due process of law. Accordingly, we remand this case to the district court for the consideration of the causes of action the plaintiff has pleaded.

REVERSED.